



Alert - Indirect Tax - VAT

AG Kokott considers pension funds not comparable to investment funds

Following our [news report](#) about the hearing at the Court of Justice of the European Union ("ECJ") in Luxembourg regarding the application of the VAT exemption to management services, provided to Dutch pension funds implementing a conditional average salary scheme (DB scheme without additional payment obligation or CDC scheme), the Advocate General ("A-G") has presented an opinion in this case. The VAT exemption on the management services can be applied if the Dutch pension funds qualify as a common investment fund. The AG concludes that for this purpose, the Dutch pension funds must have the same characteristics as a UCITS, but doubts whether this is the case. The pension commitment mainly provides guaranteed benefits or benefits that depend on the performance of the invested capital.

Background

In 2016 the Dutch Supreme Court ruled that participants in a Dutch pension fund that implements a conditional average salary scheme ('voorwaardelijke middelloonregeling') do not run a sufficiently significant risk. As a result, such pension funds do not qualify as common investment funds and the management of these pension funds is not exempt from VAT.

According to several stakeholders, the Supreme Court's requirement that the investment risk must be of sufficient significance does not follow from earlier case law of the ECJ. In six cases, the Gelderland District Court has asked the ECJ to provide clarity about this by making use of the option to ask preliminary questions.

In essence, the referring Court asks whether the investment risk can also be borne by the collectivity of participants and whether it is relevant that the amount of the pension benefit partly depends on factors such as the number of years of pension accrual, the amount of the salary and the actuarial interest rate.

Opinion AG Kokott March 14, 2023

Dutch pension funds are not UCITS, but they can qualify as a common investment fund if they exhibit the same characteristics and thus perform the same actions, or at least are sufficiently comparable to such institutions so that they compete with them. For this, the ECJ has set a number of conditions, the only one in dispute being the requirement that participants must bear the investment risk. It is noteworthy, however, that the AG assesses all conditions again and seems to attach significant importance to the following two characteristics of a UCITS:

1. the fund must be open to an unlimited number of investors; and
2. there is a redeem or repurchase obligation.

AG Kokott concludes that a Dutch pension fund, due to its compulsory nature, is not accessible to the public but only to a limited group of investors. In addition, the AG suggests that there seems to be no redemption or repurchase obligation for the Dutch pension funds. For this reason, Dutch pension funds are not in a situation of competition with a UCITS, and are presumably not comparable to a UCITS. However, this is subject to the assessment of the referring court.

Regarding the investment risk borne by the participants in a Dutch pension fund, the AG states that if the pension commitment is primarily dependent on the number of years of service and the level of employment income, the investment risk is not comparable to a UCITS. However, if the pension commitment is primarily dependent on the performance of the invested capital, the investment risk is comparable to a UCITS. In conclusion, the AG suggests that the pension funds in question likely do not meet enough conditions to qualify for the application of the exemption.

The AG also addresses the question whether fiscal neutrality obliges the Dutch pension funds in this procedure to be treated equally to funds that implement an individual defined contribution (DC) scheme (third pillar). Pension funds with such a scheme are regarded as common investment funds. Since the individual DC pension scheme of the third pillar is a voluntary scheme, supplementing the mandatory participation in the schemes in question (second pillar), the AG also doubts in this regard whether the comparability requirement has been met. This is also the case because competition between the various pillars of the Dutch pension provision seems to be limited.

Practical implications

If the ECJ follows the opinion of the AG, it is up to the Dutch court to determine whether the pension commitment in the pension schemes of the pension funds in question, primarily depends on the number of years of service and the level of employment income or on the performance of the invested capital. Since in practice many pension schemes are comparable to the ones in this case, this ruling will be of great importance for practical applications. We do note, however, that in our opinion, the AG does not substantiate whether there is a comparable investment risk, leaving the outcome a factual matter.

Beyond pension funds, the opinion of the AG broadens the assessment framework with respect to access and redemption or repurchase obligations, which emphasizes relevance for other funds that are not a UCITS.

Finally

In our view, the opinion of the AG is remarkable, in the sense that the AG does not or hardly address the actual question submitted to the ECJ, namely whether participants in a Dutch pension fund bear an investment risk comparable to that of a UCITS. Dutch pension schemes are based on the principle of solidarity and it is characteristic that the investment risk is borne collectively. The fact that the A-G does not take this into account in her assessment is, in our opinion, a missed opportunity. Hopefully, the ECJ will take these elements into account in its judgment, which might lead to a different outcome. Of course, we will keep you informed of the continuation of this procedure.

If you have any questions, please contact your usual Deloitte advisor or one of the contact persons included in the alert.

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